

**In the High Court for the States of Punjab and Haryana
At Chandigarh**

CRM-M-6761-2019
Date of Decision : 11.03.2019

Dr. Bhupinder Singh

.....***Petitioner***

Versus

State of Punjab

.....***Respondent***

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. Preetinder Singh Ahluwalia, Advocate,
for the petitioner.

Mr. Gaurav Garg Dhuriwala, Sr. DAG, Punjab.

GURVINDER SINGH GILL, J.

1. The petitioner Bhupinder Singh has challenged order dated 29/01/2019 whereby an application filed by prosecution under Section 311 Cr.P.C. seeking permission to summon additional witnesses has been accepted.
2. A few facts necessary to notice for disposal of this petition are that initially F.I.R. No. 101 dated 21.9.2002, under Section 295-A, 371, 420, 467, 468, 471, 506, 120-B IPC and under Section 18, 19 and 20 of Transplantation of Human Organs Act 1994 was lodged at P.S. 'D' Division, Amritsar when it came to light that a trade of human organs was going on in Amritsar, wherein poor persons were induced into parting with their kidneys in lieu of some monetary consideration and kidneys so extracted used to be sold at hefty prices to rich patients. The entire scam was being run by some doctors in connivance with mediators/touts.

3. During the course of investigation of aforesaid F.I.R. No.101 dated 21.9.2002, it surfaced that in the year 2003, one Mulkh Raj Goel, whose both the kidneys had failed had contacted 'Kakkar Hospital' at Amritsar, where a deal was struck for providing a kidney to him for ₹ 2.5 lacs of a donor namely Sudesh Kumar. Said Sudesh Kumar was a labourer whose kidney was taken out for a petty amount and was transplanted in the body of Mulkh Raj Goel. However, the donor Sudesh Kumar was not provided adequate post-extraction treatment and resultantly he expired. Consequently, FIR No.25 dated 1.2.2003 under Sections 363, 302, 201, 465, 120-B IPC and under Sections 18, 19 and 20 of Transplantation of Human Organs Act, 1994, was lodged pertaining to the specific incident of death of Sudesh Kumar.
4. The trials have been proceeding rather slowly as not only a large number of witnesses have been cited but several off-shoot issues from the said trials have been agitated upto this Court and Supreme Court as well. On 3.01.2019, the prosecution moved an application dated under Section 311 Cr.P.C. (Annexure P-2) for adducing additional evidence to prove some documents by calling 8 witnesses, which has been accepted by the trial Court vide impugned order dated 29.1.2019 (Annexure P-4). The following witnesses have been ordered to be summoned:
 - (i) Ahlmad (Criminal) to the Court of Sh. Gurmeet Singh, the then Additional Sessions Judge (Ad-hoc), Amritsar, so as to prove statement of PW-6 Vinod Kumar (now arrayed as accused) and of PW-9 Mulakh Raj (later arrayed as accused but has since expired), recorded at an earlier point of time i.e. before they themselves were summoned as accused with the aid of Section 319 Cr.P.C.
 - (ii) Sh. Kunwar Pratap Singh, IPS, so as to prove letter No. 990/5E/SP City-I Amritsar dated 18.11.2002 written by him in compliance of provisions of Section 22 of Transplant of Human Organs Act 1994.

- (iii) Dr. Ravinder Singh, D.R.M.E., so as to prove the letter sent by him in response to aforesaid letter written by Sh.Kunwar Pratap Singh.
 - (iv) Nodal Officer of IDEA/Spice telecom company so as to prove ownership of sim card no. 9814043290, recovered from mobile of accused Bhupinder Singh.
 - (v) Correspondent/Manager of newspaper '*Dainik Jagran*' so as to prove news item appearing in newspaper dated 5.3.2003 pertaining to death of Sudesh, recipient of kidney.
 - (vi) Dr. Ajaib Singh, the then Civil Surgeon, Amritsar so as to prove posting record of Dr. Bhushan Aggarwal (accused) and to prove record pertaining to inquiry conducted by him regarding misconduct of Dr. Bhushan Aggarwal.
 - (vii) Criminal Ahlmad of the Court so as to produce recovery memos pertaining to taking into possession the bed-head ticket of donor and recipient; and register maintained in Cremation Ground containing entry regarding cremation of recipient Sudesh, which had been taken into possession in case FIR no. 101 of 2002.
 - (viii) Sunil Kumar, Record Keeper/Dealing hand of Guru Nanak Dev Hospital so as to prove the letter no. 17238 dated 7.6.2001 i.e. the order of Authorisation Committee of Medical College, Amritsar, granting approval for transplantation of kidney
5. Shri Preetinder Singh Ahluwalia, the learned counsel for petitioner, while assailing the impugned order has vehemently argued that the application filed by prosecution under Section 311 Cr.P.C. ought not to have been entertained having been filed at a highly belated stage i.e. after almost 16 years of the institution of the case when the trial is virtually nearing conclusion, without there being any sufficient cogent explanation as to why the said evidence was not adduced at an earlier stage. It has been submitted that any such application has to be examined with great caution and circumspection and witnesses cannot be called/recalled with the aid of Section 311 Cr.P.C. in a casual and cavalier manner so as to prejudice the

accused. The learned counsel, in this context, places reliance upon a judgment of Hon'ble Supreme Court rendered in case titled Swapan Kumar Chatterjee Vs. CBI 2019(2) SCALE 654 and Rajaram Prasad Yadav vs. State of Bihar 2013(3) RCR(Criminal) 726.

6. Opposing the petition, Mr Gaurav Garg Dhuriwala, Senior Deputy Advocate General, Punjab has submitted that the Court was fully competent to admit evidence with the aid of Section 311 Cr.P.C. and that the mere fact that such an application was filed towards the fag end of the trial would be immaterial in case the evidence sought to be brought on record is found to be necessary for just adjudication in the matter. It has been submitted that the object of Section 311 Cr.P.C. is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society and that bearing in mind the far-reaching effects of the scam on the society, the prosecution needs to be permitted to bring on record the evidence which clinches the matter. The learned State counsel in order to hammer forth his aforesaid submission places reliance upon 2007(3) RCR (Criminal) 909 Iddar vs. Aabida, the relevant extract of which reads as follows:

“10. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code : (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling,

and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case....”

7. Before proceeding to consider the rival contentions addressed before this Court, it is apposite to bear in mind the provisions of Section 311 of Cr.P.C . which read as follows:

"311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

8. A perusal of the bare provisions of Section 311 Cr.P.C. itself reveals with its broad scope and shows that the apparent object is that the aim of every Court

to discover the truth is not defeated. It empowers the Court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witnesses. The second part of the section uses the word 'shall'. It says that the Court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential for just decision of the case. The words 'essential to the just decision of the case' are the key words.

9. However, since the powers are wide, its exercise has to be done with great care and circumspection. The Court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. This is precisely what is also held in the judgments relied upon by learned counsel for the petitioner i.e. Swapan Kumar Chatterjee's case(supra) and Rajaram Prasad Yadav's case (supra).
10. Thus, whether recall of a witness is for filling-up of lacuna or is for just decision of a case depends on facts and circumstances of each case. The line of demarcation between "filling up lacuna" and genuine error or oversight" being very thin, the said issue is raised invariably in all cases where an application under Section 311 Cr.P.C. is filed.
11. Hon'ble Supreme Court in 2014(13) SCC 59 Mannan Sk Versus State of West Bengal, where a witness who had been examined and re-examined was re-called for examination after 22 years of incident, held that re-examination does not prevent further recall and that Section 311 of the Code does not put any such limitation on the Court and such witness can still be recalled if his

evidence appears to the Court to be essential to the just decision of the case.

It was further observed therein that it is for the Court to consider all the circumstances and decide whether the prayer for recall is genuine or not.

12. Hon'ble Supreme Court, in 1999(6) SCC 110 Rajendra Prasad Vs. The Narcotic Cell through its Officer-in charge, Delhi, where an order calling a witness under Section 311 Cr.P.C., at a stage when arguments had concluded, had been challenged and it was contended on behalf of the accused that the same amounted to filling up of lacuna, the said contention was turned down while observing as follows:

- “7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.
8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

13. Thus, from the ratio of the above referred judgments, it broadly emerges that :

- (i) Every mistake, error or oversight during conduct of prosecution cannot be treated as irreparable lacuna.
- (ii) No party in a trial can be absolutely barred from rectifying errors.
- (iii) If proper evidence was not adduced or relevant material not brought on record due to inadvertence, Court should permit such mistakes to be rectified.
- (iv) Court has power to recall any witness at any stage of case if Court considers it necessary for a just decision, more particularly with the aid of second part of Section 311 Cr.P.C.
- (v) The mere fact that an application has been filed at a belated stage is *ipso-facto* not a ground for declining such an application.
- (vi) Whether recall of a witness is for filling-up of a lacuna or is for just decision of a case depends on facts and circumstances of each case.
- (vii) Since, an objection of 'filling up lacuna' is invariably raised more particularly when any application is moved by prosecution, and there is a thin line of demarcation between 'lacuna' and 'error or oversight', the Court is required to examine the said aspect carefully in context of all the circumstances to decide as to whether such prayer is genuine or not.

14. Since in the present case, the prosecution seeks to examine as many as 8 witnesses, therefore it is apposite to examine the necessity in respect of each of the said 8 witnesses which is being hereinafter discussed individually:

15. **Witness no (i)** i.e. Ahlmad (Criminal) to the Court of Sh. Gurmeet Singh, the then Additional Sessions Judge (Ad-hoc), Amritsar, so as to prove statement of PW-6 Vinod Kumar (now arrayed as accused) and of PW-9 Mulakh Raj (later arrayed as accused but has since expired), recorded at an earlier point of time i.e. before they themselves were summoned as accused with the aid of Section 319 Cr.P.C.

The prosecution, in the application under Section 311 Cr.PC (Annexure P-2), sought permission to examine the Ahlmad so as to place on record the aforesaid statement of PW-6 Vinod Kumar, now arrayed as an accused, with the aid of section 33 of Indian Evidence Act.

16. The learned counsel for the petitioner has submitted that the trial Court, by permitting such previous statement of accused to be brought on record has absolutely disregarded the basic principle of criminal jurisprudence that no person can be compelled to be a witness against himself. The learned counsel has submitted that fundamental right guaranteed under Article 20(3) of Constitution of India stands violated by admitting the previous statement of Vinod Kumar.
17. I have considered the submission raised above. Article 20 of Constitution of India reads as follows:

"Article 20.

- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
- (2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

18. A perusal of sub-clause (3) of Article 20, as reproduced above, would reveal that one of the requisites to seek protection and immunity under Article 20 of Constitution of India is that such person as at the time of making statement should be a person accused of an offence. In other words, a person against whom no formal accusation had been made at the time of recording the incriminating statement does not fall within the ambit of Article 20(3) and hence his statement can be used as evidence against him provided it meets with other requirements of admissibility.
19. In the present case Vinod Kumar was initially cited as a prosecution witness, when only four accused namely Dr. P.K.Sareen, Dr. P.K. Jain, Dr. Bhushan Aggarwal and Dr. Bhupinder Singh were arrayed as accused. Statement of Vinod Kumar was recorded and he was duly cross-examined. However it was subsequently that an application under Section 319 Cr.P.C. was filed and Vinod Kumar was arrayed as an additional accused.
20. A Constitution Bench of Hon'ble Supreme Court in AIR 1954 Supreme Court 300, M.P. Sharma v. Satish Chandra, District Magistrate, Delhi, held that the protection under Article 20(3) of the Constitution is available to a person against whom a formal accusation has been levelled inasmuch as first information report had been lodged against him.
21. In a subsequent rendition by a Constitution Bench in Ramesh Chandra Mehta v. State of West Bengal, reported in AIR 1970 Supreme Court 940, Hon'ble the Supreme Court held that till there is no formal accusation a

person is not an accused person and therefore, the bar under Article 20(3) would not be available.

22. A Constitution Bench of Hon'ble Supreme Court comprising of 11 judges in a case reported as AIR 1961 Supreme Court 1808, State of Bombay Vs. Kathi Kalu Oghad, while examining the applicability of bar enacted by Article 20(3) of Constitution of India came to be following conclusions:

“16. In view of these considerations, we have come to the following conclusions -

- (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
- (2) The mere questioning of an accused person by a Police Officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion.
- (3) “To be a witness” is not equivalent to “furnishing evidence” in its widest significance, that is to say, as including not merely making of oral or written statements but also production of documents or giving material which may be relevant at a trial to determine the guilt or innocence of the accused.
- (4)
- (5)
- (6)
- (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

23. In light of ratio of aforesaid judgments, the contention of the petitioner that the previous statement is hit by Article 20(3) of the Constitution of India cannot be accepted since Vinod Kumar, at the time when he stepped into the witness box as a prosecution witness, was certainly not an accused and thus his statement recorded as a prosecution witness cannot be said to have been made when there was any accusation against him. The said statement was made in Court and there is nothing to suggest that it was made under any compulsion, threat or coercion so as to make it inadmissible. Consequently, the bar of Article 20(3) of Constitution of India is not attracted in the present case.
24. It has next been contended that in any case the statement of Vinod Kumar recorded earlier as a prosecution witness can not be admitted in evidence with the aid of Section 33 of Evidence Act as Section 33 of Evidence Act would apply to a previous statement of a witness and not of an accused. It has further been submitted that Section 33 of Evidence Act is applicable only when the witness is not available and when the accused had an opportunity of cross-examining the said witness and that since none of the said conditions exists in the present case qua Vinod Kumar, the previous statement of Vinod Kumar recorded prior to his being summoned as an additional accused with the aid of Section 319 Cr.P.C. is inadmissible.
25. The learned counsel for the petitioner has pressed into service 2004(3) RCR (Criminal) 338 Sashi Jena Vs. Khadal Swain and another wherein Hon'ble Supreme Court held that evidence given by a witness in judicial proceedings is admissible in subsequent proceedings or at later stage in same proceedings subject to following conditions only:-

- (i) that the earlier proceeding was between the same parties;
- (ii) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and
- (iii) that the questions in issue in both the proceedings were substantially the same.

26. Section 33 of Indian Evidence needs to be borne in mind to consider the aforesaid submission, which reads as follows:

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. -

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable :

Provided –

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation. - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

27. Section 33 talks of previous statement of a “witness”. However, in the present case the character of said “witness” namely Vinod Kumar has changed inasmuch as after having been summoned with the aid of Section 319 Cr.P.C. he has assumed the character of an accused. Thus, for the purpose of examining the admissibility of said earlier statement, the

character of Vinod Kumar being an accused at the later stage has also to be borne in mind. Keeping in mind the changed character of Vinod Kumar of being an accused, his earlier statement would either amount to admission or confession and consequently its admissibility would have to be assessed accordingly. Section 33 of Evidence Act would not have any applicability in the given circumstances.

28. Sections 17 to 31 of the Evidence Act pertain to admissions and confessions. While section 17 defines '*admission*', sections 18 to 31 state the principles as regards relevancy and admissibility of admissions and confessions. A perusal of the aforesaid provisions would reveal that an admission or a confession to be relevant must pertain to a "fact in issue" or a "relevant fact". The question as regards admissibility of admissions and confessions would depend on whether they would fall in the realm of "facts in issue" or "relevant facts".
29. Section 18 of Evidence Act would be applicable with equal force to criminal matters as well. Incriminating statements which are not admissible as confessions in evidence will not necessarily be excluded and can well be looked into for the purpose of corroboration. Hon'ble Supreme Court in AIR 1964 Supreme Court 1180 Haricharan Kurmi Vs. State of Bihar held that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.

30. The question of admissibility of statement of accused which is not confession came to be considered in AIR 1969 ORISSA 245, Pingal Khadia and others vs. The State, wherein it was held as follows:

“It will thus be seen that the section makes provision for recording of statement or confession. Confession clearly refers to that of an accused. The word 'statement' used in the section is not limited to the statement of a witness alone. It also covers the non-confessional statement of an accused. Thus a statement of an accused, not amounting to a confession, is admissible in evidence provided it is relevant and admissible under any of the provisions of the Evidence Act.

In (1950) 77 Ind App 65 (PC) Ghulam Hussain v. King, their Lordships of the Judicial Committee accepted the aforesaid view thus :

'The question here is quite different. It is whether a statement made under Section 164, which does not amount to a confession, can be used against the maker as an admission within the purview of Sections 18 to 21 of the Indian Evidence Act. This question has been raised in Courts in India and it has been answered in the affirmative. . . . Their Lordships consider that the affirmative answer is right. The fact that an admission is made to a magistrate while he is functioning under Section 164 of the Code of Criminal Procedure cannot take it outside the scope of the Evidence Act.'

The statement of Budni is certainly not a confession, but contains admissions of certain relevant facts. It is accordingly admissible under Sections 18 to 21 of the Evidence Act, provided it was voluntary.”

31. Hon'ble Apex Court in State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari, (2013) 12 SCC 17, while explaining the principles regarding admissibility of admissions in evidence, held as follows:

“14. Admissions and confessions are exceptions to the “hearsay” rule. The Evidence Act places them in the province of relevance, presumably on the ground that they being declarations against the interest of the person making them, they are in all probability true. The probative value of an admission or a confession does not depend upon its communication to another. Just like any other piece of evidence, admissions/confessions can be admitted in evidence only for drawing an inference of truth. (See *Law of Evidence*, by M. Monir, 15th Edn., Universal Law Publishing

Co.) There is, therefore, no dispute whatsoever in our mind, that truth of an admission or a confession can not be evidenced through the person to whom such admission/confession was made. The position, however, may be different if admissibility is sought under Sections 6 to 16 as a “fact in issue” or as a “relevant fact” (which is the second question which we are called upon to deal with). The second question in the present case, we may clarify, would arise only if we answer the first question in the negative. For only then will we have to determine whether these confessional statements are admissible in evidence otherwise than as admissions/confessions.

15. Therefore, to the extent that a confessional statement can be evidenced by the person before whom it is recorded, has been rightfully (*sic* erroneously) adjudicated by the High Court, by answering the same in the affirmative. The more important question however is, whether the same would be admissible through the witnesses at Serial Nos. 63 to 66 in Special Case No. 21 of 2006. Our aforesaid determination, commences from the following paragraph.
 16. The scheme of the provisions pertaining to admissions/confessions under the Evidence Act (spelt out in Sections 17 to 31) makes admissions/confessions admissible (even though they are rebuttable) because the author of the statement acknowledges a fact to his own detriment. This is based on the simple logic (noticed above), that no individual would acknowledge his/her liability/culpability unless true. We shall determine the answer to the first question, by keeping in mind the basis on which, admissibility of admissions/confessions is founded. And also, whether confessions in this case (made to the witnesses at Serial Nos. 64 to 66) have been expressly rendered inadmissible, by the provisions of the Evidence Act, as is the case set up by the appellant.
 17. An examination of the provisions of the Evidence Act would reveal that only such admissions/confessions are admissible as can be stated to have been made without any coercion, threat or promise.”
32. There is a cardinal distinction between a party who is author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. This distinction has been clearly spelt out in AIR 1966 Supreme Court 405 Bharat Singh and others Vs. Mst. Bhagirathi with the following observations :

“19. Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of

contradicting the witness under Section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence."

33. Apart from Section 18 of Evidence Act, Section 10 of the Evidence Act would also be attracted as the statement of Vinod Kumar tends to disclose facts about the modus-operandi and the conspiracy i.e. the manner in which the entire racket was going on. Section 10 of Evidence Act for the sake of ready reference is reproduced below:

10. Things said or done by conspirator in reference to common design.

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

34. Hon'ble Supreme Court, AIR 2000 Supreme Court 1691 State of Maharashtra Vs. Damu and others while discussing the scope of Section 10 of Evidence Act held as follows:

"43. One of the offences alleged against all the accused is criminal conspiracy under Section 120(B) of the Indian Penal Code. Section 10 of the Evidence Act falls within Chapter 2 which deals with "relevancy of facts". That Section renders anything said, done or written by anyone of the conspirators in reference to their common intention as a relevant fact, not only as against each of

the conspirators but for proving the existence of the conspiracy itself. Further, the said fact can be used for showing that a particular person was a party to the conspiracy. The only condition for application of the rule in Section 10 is that there must be "reasonable ground to believe that two or more persons have conspired together to commit an offence." In this context, we may refer to S. Nalini and others v. State by D.S.P., CBI, SIT, Chennai, 1999(5) SCC 253. In paragraph 107, this Court has stated thus :-

'The first condition which is almost the opening lock of that provision is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some *prima facie* evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement "in reference to their common intention". Under the corresponding provision in the English law the expression used is "in furtherance of the common object". No doubt, the words "in reference to their common intention" are wider than the words used in English law (vide *Sardar Sardul Singh Carveeshar v. State of Maharashtra*).'

35. The basic principle which underlies in Section 10 of the Evidence Act is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy as has been held in State of Gujarat v. Mohd. Atik, 1998(4) SCC 351. Further, Hon'ble Apex Court in AIR 1965 SC 682, Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra observed that the expression '*in reference to their common intention*' is wider than the words '*in furtherance of their common intention*' and is very comprehensive and it appears to have been designedly used to give it a wider scope than the words '*in furtherance of*' as existing in English law. Section 10 permits

anything said, done or written by anyone of such persons in reference to their common intention to be recorded as a relevant fact as against each of the persons believed to be so conspired. The only limitation being the existence of a 'common intention'.

36. Hon'ble Apex Court in Mohd. Jamiludin Nasir v. State of W.B., (2014) 7 SCC 443, held as follows:

“144. Going by the above provisions, the relevance, efficacy and reliability of the confessional statement of appellant Nasir when examined on the touchstone of Sections 10 and 30 of the Evidence Act, it will have to be stated that the confession of a co-accused cannot be treated as substantive evidence to convict other than the person who made the confession on the evidentiary value of it. It is, however, well established and reiterated in several decisions of this Court that based on the consideration of other evidence on record and if such evidence sufficiently supports the case of the prosecution and if it requires further support, the confession of a co-accused can be pressed into service and reliance can be placed upon it. In other words if there are sufficient materials to reasonably believe that there was concert and connection between the persons charged with the commission of an offence based on a conspiracy, it is immaterial even if they were strangers to each other and were ignorant of the actual role played by them of such acts which they committed by joint effort. Going by Section 30 of the Evidence Act, when more than one person are being tried jointly for the same offence and a confession made by one of such persons is found to affect the maker as well as the co-accused and it stands sufficiently proved, the Court can take into consideration such confession as against other persons and also against the person who made such confession from the above proposition, we can make reference to the decisions of this Court in *Natwarlal Sakarlal Mody v. State of Bombay* and *Govt. (NCT of Delhi) v. Jaspal Singh*.”

37. In the present case while Mulkh Raj was the recipient of kidney who later on expired, Vinod Kumar is his son of the recipient Mulkh Raj. They having paid money for the procuring and implant of kidney had *prima-facie*

rendered themselves liable for prosecution for offences including offence under section 19 of The Transplantation of Human Organs Act, 1994. The prosecution had initially filed challan only against four accused namely Dr. P.K.Sareen, Dr. P.K. Jain, Dr. Bhushan Aggarwal and Dr. Bhupinder Singh. During the course of their trial Vinod Kumar appeared as PW-6 and Mulkh Raj appeared as PW-9. Their testimonies disclosed that they had approached Kakkar Hospital in Amritsar where Dr.P.K.Sareen, upon examining Mulkh Raj told them that his kidney had been damaged and that he had full arrangement for transplant of kidney and they should arrange for an amount of ₹ 2.5 lacs and told them to meet Dr. Bhupinder Singh and Kulwinder, computer clerk. It was further disclosed that they were later sent to Advocate Pradeep Saini for paper work. Accordingly they arranged for the amount and deposited the same with co-accused and Mulkh Raj was operated upon for kidney transplantation by Dr. Bupinder, Dr. Bhushan and Dr. P.K.Sareen.

38. Vinod Kumar (PW-6) had specifically deposed that they were told that not only the facilities for kidney replacement were available but even kidneys were available and that the total expenditure would be ₹ 2.5 lacs. He further stated that his father Mulkh Raj was operated upon on 27.7.2001 for kidney transplant and that when he and his father visited the hospital again on 18.7.2001 for follow-up, they were told that the donor Sudesh had expired. He further stated that he was taken to Cremation Ground by the Dr. Bhupinder, Dr. Bhushan and Dr. Jain, where his signatures were obtained and then he was allowed to go and told not to talk to anybody about the incident. Subsequently, Mulkh Raj and his son Vinod Kumar were summoned to face trial as accused with the aid of Section 319 Cr.P.C.

39. The aforesaid statement of Vinod Kumar pertains to some material facts and certain admissions which are relevant to the issues involved in the matter. This earlier statement of Vinod Kumar, recorded in Court on oath, would shed light on the conduct of the parties before the offence of extracting kidney and implanting kidney was actually committed, which would qualify to be called conspiracy. Although the value of such statement/admission made by an accused qua his co-accused would mainly be of corroborative nature and such evidence cannot be treated as substantive evidence qua co-accused, but the same cannot be absolutely overlooked or washed off. It will be for the Court to see as to how much reliability can be attached to such earlier statement. Thus, the earlier statement of Vinod Kumar, being admissible in evidence, needs to be brought on record.
40. For the reasons already discussed above, this Court is of the opinion that even the testimony of Mulkhraj, who had earlier stepped into witness box as PW-9, would also be a relevant piece of evidence. Though, in the given circumstances, such earlier statements may not be a substantive piece of evidence qua the co-accused but can at least be used for the purpose of corroboration or contradiction so as to lend some kind of assurance regarding the existence or non-existence of a fact. This is the very purpose of Section 311 Cr.PC i.e. to enable the Court to reach at a just decision. Thus, this Court does not find any infirmity in the order of the trial Court in accepting the request of the prosecution for examining witness no (i) i.e. Ahlmad(Criminal) to the Court of Sh. Gurmeet Singh, the then Additional Sessions Judge(Ad-hoc), Amritsar.
41. **Witness no (ii)** i.e. Sh. Kunwar Pratap Singh, IPS, so as to prove letter no. 990/5E/SP City-I Amritsar dated 18.11.2002

written by him in compliance of provisions of section 22 of Transplant of Human Organs Act 1994.

The prosecution seeks to recall PW-7 Kunwar Vijay Partap Singh, IPS mainly for the purpose of proving letter No.990-5E/SP City-1 ASR dated 18.11.2002 written by him pertaining to compliance of Section 22 of Transplant of Human Organs Act, 1994(hereinafter referred to as 'TOHO Act' for short). Although, it is not disputed that the said letter was written in respect of the earlier FIR i.e. FIR No.101 dated 21.9.2002 and not in respect of the present FIR i.e. FIR No.25 dated 1.2.2003, as has also been admitted by the witness himself, but as noticed above the later FIR is infact outcome of the offences which are subject matter of earlier FIR. It was upon finding that the donor Sudesh had died that a separate FIR as regards his death, was lodged although death was a result of the offences already committed, regarding which the earlier FIR i.e. FIR No.101 dated 21.9.2002, had been lodged. Since provisions of section 22 of TOHO Act 1994 mandate that a notice must be issued to the Authorisation Committee before a person other than the Committee files a complaint and in the present case S.P. City-I had issued notice vide letter dated 18.11.2002 to the Committee in respect of the racket of kidneys transplant, therefore said document is an important piece of document, mainly for the purpose of compliance of provisions of section 22 of TOHO Act 1994. It is not a document which has been created subsequently. As such, this Court does not find any infirmity in acceptance of the application under Section 311 Cr.P.C. by the trial Court as regards the said evidence.

42. **Witness no (iii)** i.e. Dr. Ravinder Singh, D.R.M.E., so as to prove the letter sent by him in response to aforesaid letter written by Sh.Kunwar Pratap Singh.

For the reasons recorded above while discussing the evidence of Sh. Kunwar Pratap Singh, pertaining to compliance of provisions of section 22 of TOHO Act, the examination of Dr Ravinder Singh, D.R.M.E., who had written a letter in response to letter of Sh. Kunwar Pratap Singh, is equally important and necessary for just adjudication in the matter and as such the trial court has not committed any error in granting permission for summoning the aforesaid witness under section 311 Cr.P.C.

43. **Witness no (iv)** i.e. Nodal Officer of IDEA/Spice telecom company so as to prove ownership of sim card no. 9814043290, recovered from mobile of accused Bhupinder Singh.

During the course of investigation, the police had taken into possession mobile phone bearing IMEI No. 350179627451477 from possession of Dr Bhupender Singh which was having a SIM bearing No. 9814043290. In order to establish that the aforesaid telephone number was indeed being used by Dr Bhupender Singh the record pertaining to issuance of the SIM by the telecom company would be required to be proved. Though the prosecution ought to have been more vigilant so as to have examined the said witness at the earliest, but in any case, the nature of evidence being such which could prove material, this Court does not find that the trial Court has committed any infirmity in accepting the application of the prosecution qua examining a Nodal officer of the telecom company.

44. **Witness no (v)** i.e. Correspondent/Manager of newspaper '*Dainik Jagran*' so as to prove news item appearing in newspaper dated 5.3.2003 pertaining to death of Sudesh, recipient of kidney.

It is well settled that no authenticity can be attached to a news item published in a newspaper and that the facts stated therein would be required to be established by leading independent evidence regarding existence of such facts. Any news published in a newspaper cannot be taken as gospel truth. In the present case the factum of death of the donor Sudesh cannot be established from the news item in respect of his death. Rather the prosecution would be required to lead cogent independent evidence to establish the said factum. In these circumstances the order of the trial Court in accepting the application moved by prosecution under Section 311 Cr.P.C. insofar the same pertains to examination of newspaper correspondent/Manager of newspaper '*Dainik Jagran*' cannot be accepted and consequently the impugned order, calling newspaper correspondent/Manager of newspaper '*Dainik Jagran*' as a witness is set aside.

45. **Witness no (vi)** i.e. Dr. Ajaib Singh, the then Civil Surgeon, Amritsar so as to prove posting record of Dr. Bhushan Aggarwal(accused) and to prove record pertaining to inquiry conducted by him regarding misconduct of Dr. Bhushan Aggarwal.

While the record pertaining to the posting of Dr Bhushan Agarwal, co-accused of petitioner, is more or less formal, the record pertaining to enquiry conducted by Dr Ajaib Singh could have some corroborative value and thus be a relevant piece of evidence. In any case the said evidence does not strictly pertain to the present petitioner and has not been challenged by any other accused in this Court. The order passed by the trial court in this regard is thus upheld.

46. **Witness no (vii)** i.e. Criminal Ahlmad of the Court so as to produce recovery memos pertaining to taking into possession the bed-head ticket of donor and recipient; and register maintained in Cremation Ground containing entry regarding cremation of recipient Sudesh, which had been taken into possession in case FIR No. 101 of 2002.

The entire case of prosecution is based upon the allegations that the accused conducted a surgical procedure whereby a kidney of Sudesh Kumar was extracted from his body and transplanted into the body of Mulkh Raj and which had been done in violation of the provisions of TOHO Act. The record pertaining to the admission and treatment of the donor and recipient is a clinching piece of evidence. So also is the record maintained in Cremation Ground wherein factum of cremation of donor Sudesh is recorded. The police had taken the bed-head ticket of the donor and of the recipient and also the cremation-register into possession which is stated to have been placed on record in the case arising out of the connected FIR i.e. FIR No. 101 of 2002. Thus, it is certainly necessary that the prosecution be granted permission to examine the concerned Ahlmad so as to produce the aforesaid documents from record of the other case. The prayer of the prosecution in this regard is perfectly justified and has been accepted correctly.

47. **Witness no (viii)** i.e. Sunil Kumar, Record Keeper/Dealing hand of Guru Nanak Dev Hospital so as to prove the letter no. 17238 dated 7.6.2001 i.e. the order of Authorisation Committee of Medical College, Amritsar, granting approval for transplantation of kidney.

Since the present case pertains to death of the donor Sudesh Kumar whose kidney had been extracted allegedly for monetary consideration in violation of provisions of TOHO Act, therefore the circumstances under which the

Authorisation Committee accorded sanction for transplantation of kidney certainly need to be examined and for which the approval order needs to be placed on record. As such the prayer of the prosecution to summon Sh. Sunil Kumar, Record keeper/dealing hand in Sh. Guru Nanak Dev Hospital Amritsar was justified and consequently the order of the trial court accepting the application in this regard is upheld.

48. As already noticed, the evidence pertains to material aspects of the case and would certainly be required to be brought on record for just decision in the matter. Even if the prosecution had not moved any application under Section 311 Cr.P.C., the Court was competent to admit such evidence by invoking the second part of Section 311 Cr.P.C. wherein the word 'shall' has been used indicating that it is the duty of the Court to summon and examine any such person if the evidence appears to be essential to the just decision of the case, as has also been held in Iddar's case (supra). The mere fact that the application under Section 311 Cr.P.C. had been filed by the prosecution at a belated stage is no ground to shut out material evidence from record. In Mannan's case (supra) reexamination of witness had been allowed after 22 years of the incident. Similarly, in Rajender Prashad's case (supra), it has been held that an oversight in the management of prosecution cannot be treated to be an irreparable lacunae and that no party in a trial can be foreclosed from correcting errors. Although, the present case pertains to death of only one donor namely Sudesh but the same is in fact just a part of the bigger scam of illegal kidneys transplant having vast magnitude and thus, the matter has to be examined not only from the point of view of accused or the prosecution but also from the point of view of the society. The evidence

certainly was required to be brought on record and the trial Court by admitting the same with the aid of Section 311 Cr.P.C. has not committed any error.

49. As a result of the aforesaid discussion this Court does not find any infirmity in impugned order except for the acceptance of the prayer qua summoning newspaper correspondent/Manager of newspaper '*Dainik Jagran*'. Consequently while the impugned order is set aside insofar the same pertains to acceptance of the prayer qua newspaper correspondent/Manager of newspaper '*Dainik Jagran*', the remaining part of the impugned order qua summoning rest of the witnesses is upheld. Needless to mention that the extent of reliability upon such evidence would, however, depend upon all other facts and circumstances and on the quality of other evidence on record, which would be ascertained at the time of final arguments in context of all other evidence brought on record.
50. The petition stands partly accepted to the extent indicated above and with the clarification made above.

11.3.2019

kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No